

REMEDIES SYMPOSIUM:
THE BRAND V. THE MAN: CONSIDERING A
CONSTRUCTIVE TRUST AS A REMEDY FOR PRESIDENT
TRUMP’S ALLEGED VIOLATIONS OF THE FOREIGN
EMOLUMENTS CLAUSE

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One consequence of Donald Trump’s November 2016 election as president, both his friends and foes might agree, is that his administration has gotten people thinking (and talking and writing) about the Constitution, including provisions that previously languished in obscurity. No example better illustrates this phenomenon than the Constitution’s previously all but forgotten prohibitions on presidential receipt of “Emolument[s]” from foreign powers,¹ “the United States, or any of them.”²

As we detail below, to date three lawsuits have claimed that President Trump is guilty of innumerable, continuing violations of these prohibitions. While the complaints in these cases devote many words to describing the alleged unconstitutional conduct, they are surprisingly laconic and vague on what relief would be appropriate were the plaintiffs to prevail. This brief essay evaluates a constructive trust as a remedy.

We first treat, admittedly in a most cursory fashion, the merits issues (as opposed to procedural issues) raised in the pending suits. Then, we promptly pivot to a discussion of the doctrines governing imposition of a constructive trust, first in the context of private fiduciary relationships, and later as a response to government officials’ breaches of duties owed

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1. U.S. CONST. art. I, § 9, cl. 8.
2. U.S. CONST. art. II, § 1, cl. 7

to the public. Drawing on the rationale underlying the application of the constructive trust in these contexts, we argue that a court, in the exercise of its equitable jurisdiction, would be justified in finding that the violation of the Foreign Emoluments Clauses by a sitting President creates a constructive trust for the benefit of the public treasury when the violation yields personal profit or gain to the President, even if such profit does not result in financial loss to the United States.

I. THE MERITS, BRIEFLY

Though Benjamin Franklin’s receipt of a jewel-encrusted snuff box from the King of France often gets the credit,³ the concept, and much of the language, of the Constitution’s Foreign Emoluments Clause⁴ pre-dates that much ballyhooed embarrassment. Article VI of the Articles of Confederation anticipated the Constitution in prohibiting “any person holding any office of profit or trust under the United States, or any of them” from accepting “any present, emolument, office or title” from any foreign sovereign or state.⁵ Employing nearly identical language, the Constitution’s Article I, section 9 commands:

[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.⁶

The provision’s purpose is self-evident: U.S. officeholders ought not to be beholden to foreign powers. And for two centuries, the clause was virtually self-enforcing. The encyclopedic *The Constitution of the United*

3. Edmund Randolph, a delegate to the Philadelphia Convention, later invoked the example of Franklin, without naming him, in recounting the Convention’s adoption of the Foreign Emoluments Clause. See 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 465–66 (2d ed. 1891) <http://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-3> [<https://perma.cc/83Q3-X6HN>].

4. U.S. CONST. art. I, § 9, cl. 8. Article I, section 6 of the Constitution forbids the appointment of any Senator or Representative to any civil office “the Emoluments whereof shall have been increased” during the term for which he or she was elected. Moreover, after securing to the President a salary “which shall neither be increased nor diminished during the Period for which he shall have been elected,” Article II of the Constitution prohibits “within that Period any other Emolument from the United States, or any of them.” U.S. CONST. art. II, § 1, cl. 7. Though some of the suits against the President assert violations of both the Article II provision and the Foreign Emoluments Clause, we focus solely on the latter, both in the interest of brevity and because the claimed violations of the Foreign Emoluments Clause present most starkly the question of presidential loyalty explored herein.

5. Articles of Confederation, art. VI, § 1.

6. U.S. CONST. art. I, § 9, cl. 8.

States: Analysis and Interpretation indicates that the Foreign Emoluments Clause is one of the very few provisions of the Constitution for which there are no Supreme Court rulings to report.⁷

That may soon change. In 2017, no fewer than three separate lawsuits were filed in federal courts alleging that President Trump's on-going business arrangements violate both the Foreign and the Domestic Emoluments clauses. The first, filed on January 23 in the Southern District of New York by Citizens for Responsibility and Ethics in Washington (CREW),⁸ alleges (among other things) that President Trump's on-going involvement with, and enrichment from, his numerous U.S. and foreign rental and hospitality properties' dealings with the foreign governments, their representatives, and the entities they own and control, all violate the prohibition of the Foreign Emoluments Clause.⁹ In addition to seeking a judicial declaration to this effect, the only other remedy sought is an injunction ordering the President to cease "violating the Foreign . . . Emoluments Clause, as construed by [the district court]," and "to release financial records sufficient to confirm" his compliance with the court's order.¹⁰

In June, the Department of Justice moved to dismiss the suit, arguing that the plaintiffs had failed to state a claimand, in the alternative, that they lacked Article III standing, that they failed to state an injury within the Emoluments Clause's zone of interests, and that, in any event, the Clause was not implicated by "benefits arising from a President's private business pursuits having nothing to do with his office or personal service to a

7. *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 112-9, at 402-03 (2017 ed.) <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017-9-2.pdf> [<https://perma.cc/BBX5-SD3V>] (citing no cases). To be sure, innumerable Department of Justice Office of Legal Counsel opinions address issues arising under the Clause, but this is in part what is meant by self-enforcing.

8. Complaint, *Citizens for Resp. & Ethics in Washington v. Trump*, No. 17 Civ. 458 (S.D.N.Y. Jan. 23, 2017). The complaint has been twice amended and refiled. *See* Second Amended Complaint, *Citizens for Resp. & Ethics in Washington v. Trump*, No. 17 Civ. 458 (S.D.N.Y. May 10, 2017). <https://www.sdnblog.com/files/2017/06/17-Civ.-00458-2017.05.10-Second-Amended-Complaint.pdf> [<https://perma.cc/6FSQ-F27C>].

9. Second Amended Complaint at para. 7. The complaint also attacks the President's continued receipt of "payments from foreign-government-owned broadcasters related to rebroadcasts and foreign versions of the television program 'The Apprentice' and its spinoffs." *Id.* The other two suits are *Blumenthal, et al. v. Trump*, No. 1:17-cv-01154 (D.D.C. filed June 14, 2017) https://www.theconstitution.org/sites/default/files/briefs/Blumenthal_v_Trump_DDC_Original_Complaint_Final.pdf [<https://perma.cc/4FFP-3HBW>]; and *District of Columbia & State of Maryland v. Trump*, No. 8:17-cv-01596-PJM (D.Md. filed June 12, 2017) <https://ia800101.us.archive.org/13/items/gov.uscourts.mdd.391534/gov.uscourts.mdd.391534.1.0.pdf> [<https://perma.cc/6H9C-3SCH>]. Although the various lawsuits also claim violations of the Domestic Emoluments Clause, we limit our discussion here to the Foreign Emoluments Clause.

10. *Id.* at para. 257 (b).

foreign power.”¹¹ After briefing and argument on that motion, the district court delivered the President an early Christmas present on December 21 by dismissing the suit. The court ruled that none of the plaintiffs had Article III standing and that, in any event, their complaint sought resolution of a non-justiciable political question.¹² The court’s present, however welcome, was also significantly incomplete; the court expressly declined to address “whether [the] Plaintiffs’ allegations state a cause of action under either the Domestic or Foreign Emoluments Clauses” as well as “whether the payments at issue would constitute an emolument prohibited by either Clause.”¹³

In keeping with this symposium’s focus on remedial questions, we do not express an opinion on either the justiciability or merits issues in any of the pending cases. Rather, for the sake of argument we assume that the clause has been violated and consider only the propriety of a constructive trust as a remedy.

II. THE PRIVATE LAW OF TRUSTS

Within the private law of trusts, a trustee is a person who holds legal title to property for the benefit of another. However much of a rogue a person may be in his personal affairs, once he puts on the hat of a trustee, his conduct becomes subject to the highest of fiduciary standards in all matters relating to the trust. If he be rogue in that capacity—even a little or even unwittingly—any breach of the fiduciary standards to which he is subject that results in his own personal profit may be remedied by judicial imposition of a constructive trust.¹⁴ A child of equity, the constructive trust prevents a person from profiting from his wrongful conduct.¹⁵ With

11. Def.’s Mem. of Law in Support of Mot. to Dismiss, *Citizens for Resp. & Ethics in Washington v. Trump*, No. 17 Civ. 458, at 26 (S.D.N.Y. June 9, 2017) <http://guptawessler.com/wp-content/uploads/2012/05/2017-06-09-35-MTD-Mem.pdf> [<https://perma.cc/EAY8-FXDW>].

12. *Citizens for Resp. & Ethics in Washington v. Trump*, No. 17 Civ. 458, 2017 WL 6524851, at *1 n. 1 (S.D.N.Y. Dec. 21, 2017).

13. *Id.* An appeal is pending as of this writing. *Citizens for Resp. & Ethics in Washington v. Trump*, No. 17 Civ. 458, Notice of Appeal, Doc. 105 (S.D.N.Y. Feb. 16, 2018).

14. RESTATEMENT (FIRST) OF RESTITUTION § 197 (1937) (“Where a fiduciary in violation of his duty to the beneficiary receives or retains a . . . profit, he holds what he receives upon a constructive trust for the beneficiary.”).

15. The constructive trust is based upon “the equitable principle that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime.” *In re Estate of Mahoney*, 220 A.2d 475, 477 (Vt. 1966) (citing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)).

deterrence and prevention of faithless conduct as its goal,¹⁶ this remedy requires the rogue trustee to convey any ill-gotten gains to another, because allowing the trustee to retain them would unjustly enrich him.¹⁷

To remain on the straight and narrow pathway of fiduciary righteousness, a trustee must adhere to the following core fiduciary standards: (1) the duty to administer trustee responsibilities in accordance with the governing document; (2) the duty of prudence; (3) the duty of loyalty; (4) the duty of impartiality; and (5) the duty to account and inform.¹⁸ Our discussion herein primarily concerns the duty of loyalty and its application to the Foreign Emoluments Clause. Accordingly, we omit coverage of the remaining fiduciary tenets.

The duty of loyalty requires the fiduciary to act solely in the best interests of the beneficiaries.¹⁹ Consequently, the duty of loyalty includes a strict prohibition against self-dealing—conduct which entails “the risk that the fiduciary may be enriched at the expense of the beneficiary.”²⁰

An errant trustee whose conduct falls short of this fiduciary mandate is liable to the trust’s beneficiary,²¹ who can bring an action against the trustee to hold him to account for the breach. As atonement for any wrongful conduct from which the trustee profits or gains financially in his personal capacity, a court may require the trustee to convey property to the beneficiary. In other words, a court may find that the trustee holds the ill-gotten gains on constructive trust in favor of the beneficiary.²² This is

16. *Jersey City v. Hague*, 18 N.J. 584, 596 (1955) (observing that the goal of equitable remedies in cases of public trust violations are “always on the fundamental basis of preventing the unfaithful public official or public body profiting from his or its wrongdoing.”).

17. A Concise Restatement of Donative Transfers and Trusts 458 (Thomas P. Gallanis ed. 2017). *See also* Restatement (First) of Restitution § 160 (1937); Restatement (Second) of Trusts § 1 cmt. e (1959); V.A. Scott, *The Law of Trusts* § 462, at 3413 (3d ed. 1967)).

18. Note that this list is not intended to be exhaustive of the duties of trusteeship. For a fulsome categorization, *see* GALLANIS, *supra* note 17, at 761-813.

19. *Id.* at 769. “The duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships.” *Id.*, at 770. This fiduciary obligation is one of undivided loyalty to the beneficiaries and requires the trustee to “subordinate his own interests to the welfare of the beneficiaries” in all matters pertaining to the trust. Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1089 (2004) (citing Bogert & Bogert § 543, at 217; RESTATEMENT (SECOND) OF TRUSTS § 170 (1959)).

20. Natelson, at 1089; GALLANIS, at 769 (noting that, with certain exceptions, “the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee’s fiduciary duties and personal interests.”).

21. A trust may have more than one beneficiary. For simplicity, we use the singular form throughout this paper.

22. “Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other.” RESTATEMENT (FIRST) ON RESTITUTION § 190 (1937). “Where a fiduciary in violation of his duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what

so even when the beneficiary suffers no harm from the trustee's faithless conduct.²³

III. CONSTRUCTIVE TRUSTS AND THE PUBLIC TRUST DOCTRINE

Drawing on the private law of trusts, courts have long held public officials to the same fiduciary standards imposed upon private trustees. Together, these standards form the core of the public trust doctrine.²⁴ And, as in the private law of trusts, it is the breach of a fiduciary duty which serves as the cornerstone for the imposition of a constructive trust when the breach allows the public official to obtain personal profit or gain.²⁵ "If the public can recover from the [corrupt public official] everything he gained from his misconduct, whether or not the public itself suffered direct loss, then it has a powerful weapon for protecting itself from its faithless servants."²⁶ In this regard, the constructive trust serves as the appropriate vehicle both to vindicate the public interest in holding the corrupt public official to account and to deter other fiduciary offenses.²⁷

For example, in *Jersey City v. Hague*, when three city officials banded together to force city employees to pay over to the officials three percent of the employees' salaries in an extortion scheme extending over a thirty-two year period, the city sued. In determining whether the trial court had properly granted a motion to dismiss for failure to state claim, the Supreme Court of New Jersey reversed. The court found the city to be the real party in interest,²⁸ and the city officials to have held "positions of public trust,"²⁹ to have allegedly looted the public till,³⁰ and to have violated the fiduciary duties they owed to the public (if the allegations

he receives upon a constructive trust for the beneficiary." RESTATEMENT (FIRST) ON RESTITUTION § 197 (1937). The constructive trust is not a trust in the true sense of the word, but merely a legal term for the equitable remedy described in this section.

23. RESTATEMENT (FIRST) ON RESTITUTION § 197, cmt. c (1937) ("The rule stated in [§ 197] is applicable although the profit received by the fiduciary is not at the expense of the beneficiary.").

24. The basic idea of the public trust doctrine is that "public officials are legally bound to [adhere to] (appropriately adapted) standards borrowed from the law regulating private fiduciaries." Natelson, at 1088.

25. RESTATEMENT (FIRST) OF RESTITUTION § 197 (1937) ("Where a fiduciary in violation of his duty to the beneficiary receives or retains a . . . profit, he holds what he receives upon a constructive trust for the beneficiary.").

26. Arthur Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214, 215 (1954); see also *Jersey City v. Hague*, 18 N.J. 584, 589-91. Here, the term "corrupt" is not limited solely to a quid pro quo form of bribery, but rather includes other types of violations of the public trust.

27. *Hague*, 18 N.J. at 596.

28. *Id.* at 596.

29. *Id.* at 589.

30. *Id.* at 588-89.

were proven true).³¹ Accordingly, the court held that the plaintiff's requested remedy—a constructive trust in favor of the city—was an appropriate prayer for relief.³² The court's decision relied heavily upon the public trust doctrine.³³ Other examples abound, and courts have imposed constructive trusts for public-official wrongdoing in myriad contexts.³⁴

To the extent that the constructive trust is an appropriate remedy for a public official's violation of his fiduciary duties, so too would it be an appropriate remedy for a federal officeholder's violation of a constitutional duty that results in that officeholder's profit or gain. This is so, at least in part, because in drafting and ratifying the Constitution, the Founders applied the tenets of the public trust doctrine, and therefore built into the constitutional structure the same fiduciary duties as those from the private law of trusts.³⁵

IV. THE FIDUCIARY LAW OF THE FOUNDERS

The rogue public official was a well-known character to the Founders, and they feared, mightily, that a faithless public servant would be swayed by both foreign and domestic influences to act against the national interest in exchange for personal gain. This clear-eyed vision of human nature and the corrupting effects of power gave the Framers a particularly robust sense of the need to address these risks as they

31. *Id.* at 589-96.

32. *Id.* at 596.

33. *Id.* at 589-91 (“[Public officials] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. . . . These obligations are not mere theoretical concepts or idealistic abstractions of no practical force or effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.”) (citations omitted). Other cases bear out the notion that the constructive trust is an appropriate remedy for corruption by public officials, regardless of whether the public till suffers any actual loss. *See, e.g.,* *United States v. Carter*, 217 U.S. 286 (1910) (finding that the imposition of a constructive trust was the appropriate remedy, even though the Army had not been financially aggrieved and stating: “The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.” *Id.* at 306.).

34. *See, e.g.,* *Minneapolis v. Canterbury*, 142 N.W. 812 (Minn. Sup. Ct. 1913); *City of Boston v. Santosuosso*, 10 N.E.2d 271, 274 (Mass. Sup. Jud. Ct. 1937); *Chicago Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181 (Ill. 1980).

35. Natelson, *supra* note 19 at 1091.

undertook the sober and awesome obligation of creating a new form of government. Their solemn task in this regard benefitted from their knowledge of, and reverence for, fiduciary tenets. Indeed, at the time of America's founding, those who framed and ratified our Constitution operated within a political and legal context built upon a "fiduciary ideal of government service"³⁶—i.e., the concept of a public trust doctrine applicable to public officials—which formed a core principle of founding-era standards of governance.³⁷

According to Professor Robert G. Natelson's extensive study of founding-era documents, the Founders' understanding and application of public trust tenets encompassed the five core fiduciary principles from private trust law.³⁸ The Founders were steeped in fiduciary law principles;³⁹ they discussed these principles during the drafting and ratifying debates;⁴⁰ and they incorporated mechanisms within the constitutional structure to ensure that fiduciary standards would be met.⁴¹

The Founders created a structure of government that reflects the public trust doctrine's fiduciary norms, in part to ensure that public

36. *Id.* at 1083.

37. *Id.* at 1095-1135 (examining founding-era documents and concluding that the "public trust doctrine seems to have been an ideal that almost everyone agreed on", *Id.* at 1137).

38. *Id.* at 1088-1168 (noting that, although the terminology and foci of emphasis varied, the core duties permeated both the sources upon which the Founders relied and the language the Founders themselves used to draft and discuss good principles of governance).

39. See Natelson, at 1077 (noting that the Founders' political and legal canon was replete with discussions of public trust and the attendant fiduciary obligations imposed upon public officials); Complaint, District of Columbia & State of Maryland v. Trump, No. 8:17-cv-01596-PJM (D.Md. filed June 12, 2017) (observing that the Articles of Confederation used the language of trusts in the predecessor to the Foreign Emoluments Clause in referring to office holders to whom the provision applied, *Id.*, at 8 (citing ARTICLES OF CONFEDERATION OF 1781, art. VI, §1) and that many state constitutions contained similar provisions which incorporated the language of trusts, *Id.* at 31-32 (citing MD. CONST. of 1776, art. 33 and 53; PA. CONST., DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE COMMONWEALTH OR STATE OF PENNSYLVANIA, art. V; S.C. CONST. OF 1776, art. X; and MASS. CONST. ch. II, art. XIII.)).

40. E.g., James Madison Journal (July 20, 1787), in Max Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1911) <http://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-vol-2> [<https://perma.cc/P6BP-F6XG>], (observing that a "chief Magistrate," left unchecked, would risk "betray[ing] his trust to foreign powers."); Letter from Roger Sherman (Dec. 8, 1787), in SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 286 (James H. Hutson ed., 1987) http://www.consource.org/document/roger-sherman-to-_-1787-12-8/ [<https://perma.cc/KZC2-RR4Y>] ("In every government there is a trust, which may be abusedFalse"); THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (noting that persons elected to office "may find compensations for betraying their trust. . ."); see also Natelson, at 1077, n. 271 (noting the frequent use by The Federalist of the terms "public trust," "guardian," "guardianship," "public servant" (or words of similar import), "trustee", and "agent").

41. See Natelson, at 1137-1168 (describing how various provisions of the Constitution implement core fiduciary standards from the law of trusts).

officials, including (even especially) the Chief Executive, would be bound by them.⁴² For our purposes, we limit discussion strictly to the duty of loyalty, which is the duty most heavily implicated by the Foreign Emoluments Clause. As for that duty, the exclusive, undivided loyalty of a federal office-holder is in the best interest of the nation.⁴³ The Framers incorporated a number of mechanisms to ensure the President's undivided loyalty to the American public in the execution of the nation's laws and the administration of the nation's business.⁴⁴ To ensure adherence to the duty of loyalty, the Framers made it more difficult for the President to succumb to the temptations of foreign corrupt influences by including the Foreign Emoluments Clause.⁴⁵

The duty of loyalty was so central to the Framers' understanding of the fiduciary nature of public office that they relied upon it as rationale for including a provision allowing for the impeachment and removal from office of a faithless Chief Executive.⁴⁶ Remedies beyond the Constitution also exist. Anti-corruption statutes passed by Congress, for example, criminalize certain conduct that also entails breaches of the public trust.⁴⁷

42. *Id.* at 1168 (“[O]ne of the Founders’ ‘general purposes’ was to construct a government that would, to the extent practicable, operate according to certain fiduciary norms.”).

43. Complaint at 16, *Citizens for Resp. & Ethics in Washington v. Trump*, No. 1:17-cv-00458 (S.D.N.Y. filed June 14, 2017) <http://guptawessler.com/wp-content/uploads/2017/08/MembersofCongress.pdf>.

44. Among them are the checks and balances of power invested in the separate branches of government, designed to make each branch independent from the potential for undue influence of the others (Natelson, at 1147-48); the prohibition against federal legislators serving in or accepting newly-created or newly-enhanced executive offices so as to “‘guard[] against the danger of executive influence upon the legislative body,’” (*Id.*, at 1148 and n. 315 (citing U.S. CONST. art. I, § 6, cl. 2 and quoting THE FEDERALIST NO. 76, at 395 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) http://files.libertyfund.org/files/788/0084_LFeBk.pdf); the provision barring changes to executive compensation during his or her term of office, *Id.*, at 1148 (2004) (citing U.S. CONST. art. II, § 1, cl. 7); and the Domestic Emoluments Clause, which was intended to minimize the likelihood of domestic corruption (U.S. CONST. art. II, § 1, cl. 7).

45. U.S. CONST. art. II, § 1, cl. 5. Other examples of loyalty-infused provisions include a requirement that only natural-born citizens are eligible to be President (Natelson, at 1148 (citing U.S. CONST. art. II, § 1, cl. 5)), and a requirement that, prior to assuming office, the President-elect swear or affirm loyalty to the United States Constitution (U.S. CONST. art. II, § 1, cl. 7).

46. U.S. CONST. art. II, § 4. During the Constitutional Convention debates, for example, James Madison expressed his concerns about the risk of disloyalty in his support for an impeachment provision:

[I]t [is] indispensable that some provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate. The limitation of the period of his service, [sic] was not a sufficient security. False He might pervert his administration into a scheme of speculation or oppression. He *might betray his trust* to foreign powers.

James Madison Journal, *supra* note 40 at 65-66 (emphasis added).

47. See, e.g., *Bribery of Public Officials and Witnesses*, 18 U.S.C. § 201(b) (1948); *Foreign Agents Registration Act*, 18 U.S.C. § 219 (1939).

But even when duty-of-loyalty violations do not rise to the level of criminality,⁴⁸ or create the political will to impeach, another potentially powerful remedy remains for rectifying a rogue President's wrongdoing. That remedy is the constructive trust.⁴⁹

V. CONSTRUCTIVE TRUSTS AND THE FOREIGN EMOLUMENTS CLAUSE

In light of the Founders' reliance on fiduciary principles from trusts law in drafting and ratifying the Constitution, courts' use of constructive trusts as a remedy for breach of those duties by a public official, and the general acceptance of the public trust doctrine in Anglo-American law, we now consider how the public trust doctrine operates as justification for the imposition of a constructive trust when a sitting President violates the Foreign Emoluments Clause.⁵⁰ In this regard, we apply the fiduciary duty of loyalty to conduct that would align with that standard, and we draw a contrast to conduct that would fall short of that standard.

When making decisions in an official capacity, a President must do so with a singular goal in mind: the best interests of the nation. When a President's undisclosed, private business affairs are entangled with foreign nations, the public may reasonably be concerned that policy choices are based upon on what is best for the President's private interests, or indebtedness to a foreign government, or what is in that foreign government's best interests.⁵¹

48. See *Jersey City v. Hague*, 18 N.J. 584, 591 (1955) (observing that civil law may provide a remedy for public corruption even when criminal does not). See also, *Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers*, 11 Op. O.L.C. 67, 68 n. 2 (1987) (concluding that not all conduct that violates the Emoluments Clause falls within the criminal proscription of § 219).

49. Lenhoff, *supra* note 26 at 215. Indeed, the constructive trust may prove to be an even more effective remedy than either impeachment or prosecution because it is “[a] sanction which divests a dishonest official of his ill-gotten rewards” and consequently “cuts the heart out of his enterprise.” *Id.*

50. Although the same principles apply to the Domestic Emoluments Clause, we limit our discussion to the Foreign Emoluments Clause in light of space considerations.

51. Complaint at 41, *Citizens for Resp. & Ethics in Washington v. Trump*, No. 1:17-cv-00458 (S.D.N.Y. filed June 14, 2017) <http://guptawessler.com/wp-content/uploads/2017/08/MembersofCongress.pdf> [<https://perma.cc/QDU9-G653>] (citing *Applicability of the Emoluments Clause to Nongovernment Members of ACUS*, 17 Op. O.L.C. 114, 122 (1993) (commenting on the enduring wisdom of the Clause's central insight: that our leaders “might be biased, and [their] loyalty divided, if they received financial benefits from a foreign government.”)). Similarly, the Domestic Emoluments Clause was adopted to ensure that the President's loyalty remained devoted to the best interests of the union and that his judgment in that regard would not be tainted by “pecuniary inducement[s]” that would turn the presidency into “a position of both power and profit.” Complaint at 43, *Citizens for Resp. & Ethics in Washington v. Trump* (quoting *Nixon v. Sampson*, 389 F. Supp. 107, 137 (D.D.C. 1975), *rev'd by Reporters Comm. for Freedom of the Press v. Sampson*, 591 F.2d 944 (D.D.C. 1978) (internal quotation marks omitted)).

The Foreign Emoluments Clause exists precisely to address such concerns. By requiring a President to secure congressional consent before accepting an emolument from a foreign government, the Foreign Emoluments Clause operates on an underlying premise that Congress itself will operate in good faith and undertake the necessary investigations—openly and transparently—to determine whether it should grant or withhold consent. A President who meets the strict duty of loyalty called for under fiduciary principles would ensure that he conducts public business transparently, and without conflicts of interest, that he obtain the consent of Congress before accepting a foreign emolument, and that he cooperate with Congress in its efforts to determine whether to allow a given emolument. In practice, this means that a President should release his tax returns, divest himself of potentially problematic holdings, make use of blind trusts, follow the advice of ethics experts,⁵² submit formal requests to Congress (and wait for approval) before accepting any emolument from a foreign government, and dispose of any emolument already in his possession in the manner prescribed by Congress.⁵³

Indeed, in efforts to comply with the emoluments clauses, past presidents have released their tax returns, divested themselves of potentially problematic holdings, made use of blind trusts, obtained and relied upon advice from the Office of Government Ethics (OGE), sought congressional consent to accept foreign emoluments, and followed congressional direction in disposing of any foreign emolument already in the President's possession.⁵⁴

If, instead of following these past practices, a President were to defy all of them (as Trump is alleged to have done),⁵⁵ then the public would

52. In this regard, the non-partisan Office of Government Ethics has, for decades, offered legal advice to help Presidents avoid conflicts of interest, including any that may arise as a result of business entanglements (whether foreign or domestic) or other transactions that may implicate the Emoluments Clauses so that the President can, if necessary, obtain congressional approval, decline an emolument, or divest himself from problematic business holdings.

53. Complaint at 32-33, *Blumenthal, et al. v. Trump*, No. 1:17-cv-01154 (D.D.C. filed June 14, 2017) https://www.theconstitution.org/sites/default/files/briefs/Blumenthal_v_Trump_DDC_Original_Complaint_Final.pdf [<https://perma.cc/4FFP-3HBW>].

54. *Id.* (noting that in cases where Presidents have declined acceptance of gifts from foreign states, Congress has instructed that the gifts be sold and the proceeds deposited in the Department of the Treasury, or that the gifts themselves be conveyed to an appropriate governmental repository).

55. See, e.g., Complaint at 5, 12, 14, *Citizens for Resp. & Ethics in Washington v. Trump*; Complaint at 42, *District of Columbia & State of Maryland v. Trump*, No. 8:17-cv-01596-PJM (D.Md. filed June 12, 2017) <https://ia800101.us.archive.org/13/items/gov.uscourts.mdd.391534/gov.uscourts.mdd.391534.1.0.pdf> [<https://perma.cc/6H9C-3SCH>]; Complaint at 19, *Blumenthal, et al. v. Trump*.

have good reason to ask in whose interests he acted when he exercised the vast authority of his office.⁵⁶ In such a case, the public would be more than justified in concluding that at best the President's loyalty is divided, and that at worst he is, at the expense of the public weal, either profiting personally or advancing the interests of a foreign government, or both.

A President's acceptance of foreign emoluments without obtaining the consent of Congress raises troubling questions about his willingness to be bound by constitutional requirements and his commitment to the rule of law. It also fails to comply with the fiduciary duty of strict loyalty to act solely in the nation's best interests. Accordingly, if demonstrated to have violated the Foreign Emoluments Clause, a President should be held to account. The violation may not constitute a crime, and it may not give rise to the political will necessary to impeach, but such a fiduciary breach should not go unaddressed. For retrospective violations that involve self-dealing, the imposition of a constructive trust would be a justifiable remedy for the failure to meet the public official's fiduciary duty of loyalty owed to the public he ostensibly serves.⁵⁷

VI. CONCLUSION

Given that fiduciary duties from the law of trusts animated the structure and provisions of the Constitution, given that those same duties find expression in the public trust doctrine, and given that the imposition of a constructive trust is the remedy for violating fiduciary duties in both the law of trusts and in cases involving public officials who have violated their fiduciary duties, it becomes eminent that an appropriate remedy in a successful Emoluments Clause case against a President, were any plaintiff to survive pre-trial challenges and prevail upon the merits, would be the imposition of a constructive trust. As an equitable remedy, the constructive trust falls within the ambit of the inherent judicial authority. It matters not that a President's receipt of foreign emoluments steers clear of raiding the public till. Courts may nevertheless reach the profits of gains obtained by self-dealing in violation of the core fiduciary standards attached to public office. Accordingly, a court finding violation of the Foreign Emoluments Clause could order disgorgement of the profits a President has realized while in office, and, to the extent they are no longer

56. Complaint at 10-11, *District of Columbia & State of Maryland v. Trump*.

57. We note that a constructive trust offers greater deterrent force than an injunction against future violations, and that an additional remedy worth considering as a mechanism for preventing prospective violations by a wayward President is a judicially imposed and administered blind trust.

in his possession, the gains can be traced to third parties and restitution ordered if not in the hands of bona fide purchasers.

As for the specific cases brought against Donald Trump, courts may perhaps be reluctant to order even such a well-worn remedy in such politically charged circumstances. Furthermore, the extent of foreign and domestic holdings and the opacity of Trump's business structure would make identifying and tracing emoluments an exceedingly complex undertaking, and one that would be an enormous drain on judicial resources. A court could—and likely would—appoint a special master to oversee and administer such matters as courts do have a long and successful record of disentangling complex business structures and complex financial transactions. Still, courts are not infrequently hesitant to be the first to extend existing remedies to new contexts, even when well within their power to do so.

Regardless, possible judicial reticence should not be taken to mean that no alternate means are available for the imposition of a constructive trust. Congress may also have power to enact legislation to provide for remedies of a President's violations of the Emoluments Clauses (foreign and domestic). Whether and to what extent Congress has such power, including what form such a statute might take, are questions that are ripe for investigation but beyond the scope of this paper. Further beyond the scope of this paper is whether, if Congress has such power, legislating what is a traditionally equitable remedy would be desirable. Certainly, it would seem that, in light of statutes such as the Foreign Gifts and Decorations Act,⁵⁸ Congress does possess such power—at least for prospective violations—and even though the Foreign Gifts Act does not establish a constructive trust as a remedy, Congress likely could codify it as such, or could embolden the courts by expressly authorizing the judicial branch to consider constructive trusts as the remedy for Emoluments Clause violations.

58. The Foreign Gifts Act, which operates as an exception to the otherwise “absolute ban” of the Foreign Emoluments Clause, covers federal employees and permits them to accept basic lodging, travel originating and ending outside the United States, meals, and gifts of “minimal value.” Jeffrey Green, *Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel*, 2013 Army Law. 15, 16 (2013). *Accord* 5 U.S.C. § 7342 (2012).